No. 05-1508

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IN THE

Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

LEIGH M. MANASEVIT *
Special Assistant Attorney General
for the State of New Mexico
JENNIFER S. MAUSKAPF
BRUSTEIN & MANASEVIT
3105 South Street, NW
Washington, DC 20007
(202) 965-3652

WILLIE R. BROWN
General Counsel
NEW MEXICO PUBLIC EDUCATION DEPARTMENT
Jerry Apodaca Education Building
300 Don Gaspar Avenue
Santa Fe, NM 87501

Counsel for the New Mexico Public Education Department

* Counsel of Record

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QUESTION PRESENTED

Whether this Court should review the Tenth Circuit Court of Appeal's decision affirming the United States Secretary of Education's application of 34 C.F.R. § 222, a regulation that is consistent with and was promulgated to implement the Impact Aid "disparity test" established under 20 U.S.C. § 7709.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-2a) is reported at 437 F.3d 1289 (2006). The initial, and now vacated, opinion of the Tenth Circuit dated December 30, 2004 is reported at 393 F.3d 1158.

The administrative case was docket number 99-81-I. The October 2001 opinion of the United States Secretary of Education (Pet. App. 34a-40a) is reported at 2001 WL 34798131 (EDDS). The April 2001 opinion of the Chief Administrative Law Judge (Pet. App. 43a-58a) is reported at 2001 WL 34402493 (ED.O.H.A.).

STATEMENT OF THE CASE

This proceeding is the Petitioners' attempt to challenge the manner in which the State of New Mexico uses state revenue dollars to voluntarily equalize operational funding in its public schools. In this manner, New Mexico guarantees each of its public school students equal access to programs and services appropriate to individual educational needs regardless of location or local economic conditions. Zuni Public School District No. 89 ("Zuni") and Gallup-McKinley County School District No. 1 ("Gallup") (collectively, the "Petitioners") are local education agencies ("LEAs"), school districts, in the State of New Mexico that receive special funding from the federal government through the Impact Aid program, a program that issues aid to compensate certain school districts for their inability to raise local property tax revenue due to the presence of federal government operations on land within the school district.[1] The law permits states that have been certified as equalized to consider Impact Aid funds that its LEAs receive when determining state allocations to LEAs. In essence, a certified equalized state is allowed to adjust the amount of *state* aid to such districts, in accordance with a federally mandated formula, to account for the receipt of a portion of the federal Impact Aid. The amount of federal Impact Aid the LEAs receive is never affected by this state decision making process which only determines state allocations to its LEAs. As a certified state, New Mexico properly considered the Impact Aid that Petitioners received in making its state allocation determinations.[2]

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[1] The terms "LEA" and "school district" will be used interchangeably throughout this Brief in Opposition.

[2] Year at issue for this case is FY 2000. Petitioners, however, are in the process of challenging the Secretary's certification of the State for every FY since then as well. These cases have been stayed pending the outcome of the Petition.

Understandably, Petitioners would prefer that the Impact Aid they receive not be considered when the State performs its equalization. In that scenario, a greater share of State funds would flow to Petitioners and thus a higher total revenue per student for students attending Petitioners' schools would result. As a consequence, however, a necessarily lower share of State funds would flow to those LEAs not receiving Impact Aid. Further, the unreduced state aid flowing to Petitioners would be partially reimbursing their impacted districts for the same loss of revenue that the Impact Aid is reimbursing, resulting in a double payment.

Petitioners erroneously argue that (1) the United States Secretary of Education (the "Secretary") mis-applied the statutory definition in promulgating interpretive regulations employed in the equalization certification process and that (2) if the statutory definition were properly applied, then the State would not qualify for certification and, accordingly, would not be permitted to take Impact Aid into account in making its allocations to LEAs throughout the State. By Petitioners' argument, the State should allocate more money to Petitioners' districts and, as a consequence of increasing aid to Petitioners' districts, less money to those districts that do not receive Impact Aid. Despite four lower reviews consistently upholding the Secretary's regulation and its application leading to certification, Petitioners seek additional review by this honorable Court.[3]

While Petitioners understandably desire to increase aid to their students, New Mexico's goal is to equalize the total amount spent on students throughout the State, regardless of which LEAs they attend. This is precisely why New Mexico

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[3] The four lower reviews will be discussed in greater detail herein. The first review was conducted by an Administrative Law Judge. The Secretary conducted the second review. The third review was conducted by a Tenth Circuit Court of Appeals three judge panel and the fourth by the Tenth Circuit Court of Appeals on rehearing en banc.

equalizes its education funding, a voluntary State decision, and is also why New Mexico chooses to exercise its right to take Impact Aid into account.[4]

As discussed herein, Petitioners provide no justifiable reason for this Court to grant their Petition for Writ of Certiorari (the "Petition").

1. Statutory and Regulatory Framework. The federal Impact Aid program (20 U.S.C. §§ 7701-7714) provides financial assistance to local education agencies (LEAs) in areas where the federal government has adversely impacted an LEA's ability to provide educational services to school age children. Such adverse impact generally occurs when the LEA's ability to raise local revenues is limited due to the federal government's acquisition of real property (e.g., government buildings, military bases, Indian reservations), or because the LEA provides educational services to a large number of children residing on, or whose parents are employed on, federal property. *See* 20 U.S.C. §§ 7701-7714 et seq.

In general, the law prohibits a state educational agency ("SEA") from considering an LEA's receipt of federal Impact Aid funds (referred to by Petitioners as "taking credit" for the Impact Aid funds (*see e.g.* Pet. at 4)) when determining the amount of financial assistance the State will provide to the LEA. 20 U.S.C. § 7709(a). There is, however, an exception to this general prohibition. An SEA is authorized by the Impact Aid statute to consider an LEA's receipt of federal Impact Aid funds if the Secretary certifies that the SEA has in

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[4] New Mexico's state equalization guarantee funding formula was adopted in 1974 and has been refined and revised in the ensuing years. The underlying principle of educational equity for all students remains the cornerstone of the formula. The record is devoid of any evidence that supports a conclusion that New Mexico's decision to equalize is dependent on the fact that any of its LEAs receive Impact Aid.

effect a program of state aid that equalizes expenditures for free public education among all LEAs in the state. 20 U.S.C. § 7709(b).

In general, a state equalization program allows a state to make up the difference in funding levels for LEAs with lesser abilities to raise revenue. One reason some LEAs face such revenue raising difficulties is due to the same reasons that lead these LEAs to become Impact Aid recipients, i.e., the impact of federal facilities on land within the school district. Impact Aid receiving LEAs, however, are not the only LEAs that face great difficulty raising revenue. Other LEAs also face this problem, but because the reason for their difficulty is not the impact of federal facilities, they do not qualify under the Impact Aid program and therefore do not receive federal Impact Aid.

New Mexico has made the policy determination that the operational funding of its public education system will not be dependent on local resources. If New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would virtually receive a double payment. These LEAs would realize the full revenues generated as Impact Aid payments as a result of the negative impact of the federal presence on the local tax base, while also receiving the full amount of the state equalization guarantee.

In essence, if New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would receive a double payment. In addition to receiving federal Impact Aid to help compensate for this difficulty, these LEAs would still receive the full amount from the State (amount of equalization), which was designed to equalize regardless of the reason leading to the inequity. Thus, these Impact Aid receiving LEAs would receive double payments, one from the federal government and one from the State, to compensate them for

the same lost revenues due to the impact of a federal presence. Meanwhile, LEAs that do not qualify for Impact Aid but face equal challenges at raising revenue would receive only one payment from the State. Thus, to not take Impact Aid into account would create a great windfall and double payment to Impact Aid districts while leaving behind other revenue struggling LEAs. This is precisely the reason Congress created an exception allowing equalized states to consider Impact Aid in making their state aid determinations.

To determine whether a given state qualifies as operating such an equalized system of public education funding among its LEAs, the statute requires that the Secretary apply what we refer to as the "disparity test." *Id.* Specifically, the statute provides:

> . . . a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A). The statute further requires the Secretary, when making the disparity determination under the above provision, to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(i). The statute goes no further in addressing the specifics of how the Secretary is to apply the disparity test. It is the agency's longstanding interpretation of this test that the Petitioners ask this Court to overturn.

Because the statutory provision is open to multiple interpretations and does not provide a precise formula for making the exact disparity calculation, the United States Department of Education (the "Department") promulgated regulations clarifying the statute by detailing the methodology and precise formula for the disparity test. *See* 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. Specifically, 34 CFR § 222.162(a), taken directly from the statutory language, provides:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a). The appendix referenced by the regulation (the "Subpart K Appendix") was promulgated through notice-and-comment rulemaking with the main body of the regulation (*see* 60 Fed. Reg. 50,778 (Sept. 29, 1995)), and sets forth the Department's detailed methodology for calculating a State's disparity under 20 U.S.C. § 7709(b). In accordance with the Subpart K Appendix, the Secretary takes the following steps in applying the disparity test:

(1) Rank all LEAs on the basis of current expenditures or revenues per pupil;

(2) Identify the LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and,

(3) Subtract the lower current expenditure or revenue per pupil figure from the higher for those agencies

identified in step (2), and divide the difference by the lower figure.

See 34 C.F.R. pt. 222, subpt. K, app. Then, in accordance with the corresponding statute and regulation, if the resulting figure is 25 percent or less, that state's system qualifies as equalized. 20 U.S.C. § 7709(b)(2)(A); 34 C.F.R. § 222.162(a). The Petitioners contend that this Court should invalidate the Secretary's use of this process to determine equalization and require the Secretary to use a process suggested instead by the Petitioners.

2. Procedural History. On October 5, 1999, the Assistant Secretary for Elementary and Secondary Education, based on the results of the above analysis, certified that New Mexico qualified as an equalized state under section 8009(b) of the Impact Aid law for FY 2000.[5] Accordingly, New Mexico was entitled to consider a portion of the federal Impact Aid funds received by its LEAs when determining state aid for LEAs in the State and making those disbursements for free public education for FY 2000. *See* 20 U.S.C. § 7709(b)(1).

The Department's certification of New Mexico's equalization program has undergone numerous reviews, each review concluding that the Department's certification of the State's voluntary equalization program met the requirements of federal law. Both the administrative law judge (the "ALJ") assigned to hear the case and the Secretary concluded that New Mexico's program complied with the statutory requirements and that the Department correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). Zuni Public School District No. 89, Dkt. No. 99-81-I (Dep't Education Initial Decision April 17, 2001), 2001 WL

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[5] Section 8009(b) of the Impact Aid law is codified at 20 U.S.C. § 7709.

34402493 (ED.O.H.A.) (Pet. App. 43a-58a.); Zuni Public School District No. 89, Dkt. No. 99-81-I (October 11, 2001), 2001 WL 34798131 (EDDS) (Pet. App. 34a-40a). On appeal from the ALJ decision, the Secretary specifically addressed Petitioners' allegation that the regulation at 34 C.F.R. § 222.162(a), including the appendix thereto, failed to properly implement the disparity test set forth at 20 U.S.C. § 7709(b). The Secretary concluded that because the statute is ambiguous and because the regulations are consistent with the statute, the Department's regulatory scheme for determining disparity under 20 U.S.C. § 7709(b) is a reasonable and permissive implementation of the statute and must be upheld. (Pet. App. at 37a-40a.) Regarding the Department's promulgation of a specific methodology for calculating a state's disparity, as set forth in the Subpart K Appendix, the Secretary correctly and unambiguously noted, "There is nothing within the text of the statute that precludes this interpretation or *requires* another result." (Pet. App. at 39a.)

On Petition for Review, a Tenth Circuit panel also considered and upheld the Department's certification of the State's equalization program. *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158 (10th Cir. 2004). (Pet. App. 3a-33a.) After a thorough analysis of the statutory and regulatory scheme, the Tenth Circuit panel also found the statute to be ambiguous, and concluded that the Department's construction of 20 U.S.C. § 7709(b)(2), through its application of the disparity calculation methodology laid out in the regulation, is permissible.[6] *Id.* at 1168. (Pet. App. at 18a-19a.)

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[6] Two of the three judges on the panel endorsed and signed the opinion. The third judge on the panel issued a dissenting opinion in the case. In line with Tenth Circuit Rule 35.6 and as directed by specific order issued by the Tenth Circuit Court of Appeals, those opinions were vacated upon the granting of rehearing en banc.

Next, Petitioners filed a Motion for Rehearing En Banc before the Tenth Circuit, which was granted. After reviewing all briefs filed in the matter and hearing oral argument on the merits, the Tenth Circuit again upheld the Secretary's decision stating that "the decision of the Secretary is affirmed by an equally divided court."[7] *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 437 F.3d 1289 (10th Cir. 2006) (en banc). (Pet. App. 1a-2a.)

Petitioners now ask the United States Supreme Court to review the Secretary's process for certifying New Mexico's equalization program, a detailed and carefully constructed agency process, which already has been administratively reviewed twice and judicially reviewed twice and consistently upheld on each of these four prior occasions.

ARGUMENT: REASONS TO DENY THE PETITION

The Court of Appeals decision is correct and, based on this Court's rules, should not be reviewed by this Court on a writ of certiorari.[8] First, this decision does not conflict with any

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[7] Petitioners critique the Court of Appeals en banc decision saying the justices "could not issue a decision on the merits" and treat the rehearing as lacking "meaningful review." (Pet. at 15-16.) Petitioners curiously and without explanation cite the dissenting opinion in *Ratchford v. Gay Lib*, 434 U.S. 1080, 98 S. Ct. 1276 (1978), apparently for the mistaken proposition that the courts of appeals are prohibited from issuing anything less than a detailed memorandum opinion detailing the reasoning behind their decisions. In fact, the cited excerpt from that opinion simply regards the U.S. Supreme Court's right to deny certiorari, i.e., the right to choose to not even hear a case, without explaining its reasons for doing so. The Tenth Circuit did in fact hear the case—it even afforded Petitioners the luxury of hearing their case twice. Under Tenth Circuit Rule 36.1, the Tenth Circuit is not required to issue a detailed opinion in every case.

[8] Supreme Court Rule 10 provides guidance as to what this Court shall consider in evaluating petitions for a writ of certiorari. This Rule provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for

decision of this Court or any other United States court of appeals. In fact, Petitioners make no mention of any other court having ever even addressed this issue. Second, the rule of law that governs this case, found in *Chevron* and its progeny, is settled and was applied correctly in all prior reviews of this matter. The errors Petitioners assert solely regard factual findings. Third, Petitioners' complaints do not raise a question of federal law that must be settled by this Court. Finally, Congress, and not the United States Supreme Court, is best suited to address Petitioners concerns and the redress they seek. There is simply no justification that warrants further review.

1. The decision of the United States Court of Appeals for the Tenth Circuit is not in conflict with any decision by any other court. There is simply no conflict between this decision

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compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals . . . decision . . . conflicts with the decision of another United States court of appeals . . . [or] a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; [and,]

(c) a . . . court . . . has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Reviewing the Petition in light of Supreme Court Rule 10, the Petition should be denied.

and the decision of any other court. Petitioners attempt to create the appearance of a 'conflict' by pointing out that the Tenth Circuit decisions (the decisions from both the three judge panel and the rehearing en banc) were not unanimous. Specifically, Petitioners cite the fact that one of the judges from the original three judge panel issued a dissenting opinion and that the court was split in its decision en banc. (*See* Pet. at 15-16.) By definition, a dissenting opinion will necessarily conflict to some extent with the majority opinion from which it 'dissents.' Petitioners' reasoning seems to ask this Court to widen the scope of cases it deems certworthy to any case in which the judges of a Court of Appeals do not issue a unanimous majority opinion.[9]

This is not at all what is intended by Supreme Court Rule 10(a) which provides that situations where "a US court of appeals has entered a decision in conflict with the decision of another US court of appeals on the same important matter . . ." as an example of when it might be appropriate for the Court to grant a petition for writ of certiorari. Sup. Ct. R. 10(a). Accordingly, there are no grounds based on the idea of a

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[9] Petitioners write, "One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court," and cite three cases for this statement. (Pet. at 15.) In fact, none of the cases Petitioners cited include such holdings, not even in dicta. At best, these cases demonstrate that this Court has heard cases that happen to have arisen from lower court decisions that included divided panels and split en banc rulings. None of these cases, however, suggest that such division, in any way, effected this Court's decision to grant certiorari. The three cited cases were opinions on the merits and barely discuss the Court's reasoning for granting certiorari. One of the cited opinions, *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988), does mention the reasons for granting certiorari to be the need to "resolve important question concerning the validity of such agreements" [regarding certain labor bargaining agreements] and mentions that the Fourth Circuit Court of Appeals' decision at issue in the case "directly conflicts with that of the United States Court of Appeals for the Second Circuit." *Id.* at 741.

'conflict' within the courts for this Court to grant the petition.[10]

2. The Court should not grant the Petition for Writ of Certiorari because the rule of law at issue in this case is settled, undisputed, and was applied correctly; Petitioners' complaints merely focus on factual determinations made in lower decisions. In essence, all Petitioners ask this Court to review is the reasoning of lower decisions that found that the language of the Subpart K Appendix is not inconsistent with the statutory language. This is a factual determination—no rule of law is at issue. Looking at either the ALJ's opinion, the Secretary's decision, the vacated Tenth Circuit panel opinion, or the Tenth Circuit en banc opinion, there is simply no legal question at issue. The factual nature of the issue is evidenced throughout the Petition, including Petitioners' need to re-hash the merits of the case in full therein.[11]

Looking to the merits, the Tenth Circuit Court of Appeal's was correct in its decision to affirm the Secretary's well reasoned opinion that New Mexico satisfies the disparity requirements of 20 U.S.C. § 7709(b) based on the factual finding that the Department's implementing regulation (insofar as it includes the methodology of the Subpart K Appen-

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[10] As such, any discussion of 'conflict' does not aid Petitioners' argument. In fact, if the idea of 'conflict within the 10th Circuit' aids any of the parties, it aids the responding parties at least in so far as it evidences the ambiguous nature of the statute, which will be discussed in greater detail below.

[11] While "Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari," Petitioners nonetheless continue on to argue the merits. (Pet. at 8-9.) As Supreme Court Rule 15.2 obligates counsel "to point out in the brief in opposition, and not later, any perceived misstatement made in the Petition," we now turn to address the merits of the case as well. Other misstatements in the Petition are listed in Appendix B.

dix) is reasonable, permissible, and does not conflict with the statute. Applying well settled principles of administrative law, as discussed below, the Secretary clearly had the authority to promulgate the regulations at issue, including the Subpart K Appendix. Then, because the Secretary properly applied the statutory disparity test as detailed in the regulations, a fact which is not in dispute, the Secretary was correct in certifying New Mexico as an equalized state.

a. Where the decision of a federal agency is at issue and involves the agency's interpretation of federal statutes, as in the case at bar, the Court's review is guided by the principles established in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), and its progeny. Applying the *Chevron* test requires a two-step analysis. The threshold issue requires the Court to ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the legislative intent on that precise question is clearly and unequivocally spelled out in the statutory language, the reviewing court must give effect to that intent and "that is the end of the matter." *Id.* at 842-43; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, when the legislation is silent or ambiguous, the courts are generally required to defer to the agency's interpretation if it is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Thus, the second step requires the court to ask whether the agency's interpretation is permissible and reasonable. *Id.*

i. Applying step one, 20 U.S.C. § 7709 is clearly open to multiple interpretations and therefore qualifies as "ambiguous." More specifically, 20 U.S.C. § 7709 is silent as to the precise question of what exact methodology is required to calculate the disparity test. The statute allows states to exclude LEAs above the 95th percentile or below the 5th percentile when determining disparity, but fails to provide a precise formula for calculating disparity between LEAs in a state. While it may be clear that some number of LEAs must

be disregarded before performing the disparity test, the statutory language is unclear as to how to calculate exactly which LEAs are disregarded because what is meant by "per pupil expenditures or revenues above the 95th or 5th percentile of those expenditures or revenues in the State" is open to multiple interpretations. As the Secretary noted,

> [A]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulations, which has been duly promulgated at an appendix to Subpart K of 34 C.F.R. Part 222.

(Pet. App. at 37a.) Because the statute merely provides parameters for determining disparity, the methodology is unclear and susceptible to differing interpretations. This is precisely the source of the ambiguity.

The statute's ambiguity is also evident from both the arguments and the decisions in the prior proceedings below. Even by Petitioners' own admission, there are multiple possible interpretations of the statutory text. *See e.g.*, Zuni Petition for Review of ALJ Decision at 4 (App. at 4a). From the outset, Petitioners proffered two different approaches for making the disparity calculation. Before the Panel, Petitioners continued to argue this position contending § 7709 would permit the Secretary to follow two different approaches, neither methodology which the statute specifically identifies. Then, in the (vacated) dissent, which Petitioners stress and rely upon so heavily in the Petition, Judge O'Brien actually developed a third specific methodology that differed from the Secretary's methodology as well as the two alternative methodologies proffered by Petitioners. *See Zuni Dissent*, 393 F.3d at 1170-1172. (Pet. App. at 24a) Petitioners do not argue that one of their methods is the correct method; rather, they simply argue that either of its methods is better than the Secretary's

method. In contrast, Judge O'Brien argued in dissent that his new methodology was the only possible correct interpretation. *See Id.* Once presented with this new methodology, Petitioners decided that this new interpretation of the ambiguous statute was the correct one, notwithstanding the two possibilities they initially identified. *See e.g.*, App. at 4a. As the Secretary explained, the fact that Petitioners disagree with the regulation does not render the Department's interpretation of the statute invalid or unreasonable, the regulatory appendix is binding unless procedurally defective. (*See* Pet. App. at 39a.)

In addition to at least four different interpretations being identified over the course of this case, the differing opinions of the Court of Appeals judges as to the meaning of the statute further supports its ambiguous nature. For example, although we recognize that the Tenth Circuit panel decision is void, the disagreement among the panel, is certainly illustrative of the fact that this statute is unclear. Although the dissenting judge considered the statute to be unambiguous, the other two judges on the panel agreed with the Secretary and found the statute to indeed be ambiguous:

> We agree with the Secretary's determination that the statute is ambiguous . . . we do not know what calculations Congress intended by 'such [per pupil] expenditures in the State.' Even Zuni conceded in its argument before the ALJ that the statute 'may be ambiguous [as] to the precise formula that is to be used.' *Id.*, doc. 16 at 10. The statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or [permissible].

Zuni, 393 F.3d at 1166-1167. (Pet. App. at 16a-17a.) The difference in opinion between the judges on the panel is

prima facie evidence of the lack of clarity and the Secretary's corresponding authority to promulgate regulations in this area. The judges rehearing the case en banc were similarly split in their opinion further evidencing the statute's lack of clarity.[12]

Petitioners erroneously argue that the Secretary "glided over step one" and failed to identify the source of authority for the Department to promulgate the regulations at issue.[13] In *Chevron*, this Court reasoned that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better

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[12] Petitioners take extreme liberty in casting the Tenth Circuit Court of Appeals as failing to provide "a substantive and definitive review of the Secretary's Action." (Pet. at 15.) Petitioners go so far as suggesting that "six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions." (Pet. at 16.) This suggestion is a fanciful reading of the minds of the six judges. Not only did the Court of Appeals grant rehearing en banc to consider the case beyond Petitioners' review by the three judge panel, an opportunity rarely offered and that Petitioners are not automatically entitled to as right, but also the Court of Appeals dedicated even further time and thought to the matter by granting an actual hearing after reviewing the briefs. Again, this is not something Petitioners were entitled to by right. A more reasonable and likely assessment of the Tenth Circuit's standing opinion is that the court was simply divided, differing in opinion for legitimate reasons similar to the reason the three judge panel was split in their decision—the statute lacks clarity and can be interpreted in multiple ways. The statute's ambiguity, and not indifference from the Court of Appeals to seriously consider the case, is what likely lead to the difference in opinion and resulting split decision.

[13] Actually, Petitioners argumentatively, and rather oratorically, claim the Secretary failed to "identify the source of his authority to countermand a federal statute." Clearly and not in dispute, there is no authority to "countermand" a federal statute. As discussed herein, the regulations at issue clarify, and do not countermand, the corresponding statute.

equipped to make than courts." *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005) (relying on *Chevron*, 467 U.S. at 865-66). *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Nat'l Cable & Telecomm. Assn.*, 125 S. Ct. at 2699 (quoting *Smiley*, 517 U.S. at 742 (1996)).

In the instant case, while there is no express delegation of authority to the Department to define the methodology for determining disparity under 20 U.S.C. § 7709(b), there is an explicit delegation to the Department to evaluate a State's equalization of public school funding using the disparity standard. *See* 20 U.S.C. §§ 7709(b)(2)(B), 7709(b)(3) and 7709(c). The governing statute, as described above, lacks a precise methodology that the Department or states should utilize to make the required disparity determination (i.e., how to specifically determine the 95th and 5th percentiles of per-pupil expenditures in the State). However, it is obvious that some methodology is necessary. This constitutes an implicit delegation to the Department to set out the precise methodology to be employed, which, if reasonable, must be sustained under the *Chevron* doctrine.

The statute's failure to provide an exact formula for computing disparity, the various possible methodologies identified for computing disparity, the consistent findings throughout the proceedings, and the Court of Appeal's varying opinions, all illustrate the lack of clarity in the statute. These facts, including that at least four different interpretations of the same statute have been placed before the Court through the record, proves that the statute qualifies as "ambiguous" under the first prong of the *Chevron* doctrine. Thus, because the statute is ambiguous, the Department was authorized to fill the statutory gap with interpreting regu-

lations—so long as such regulations pass the second prong of the *Chevron* analysis, permissible and reasonable.

ii. Because the statute is ambiguous and the Department of Education is thus authorized to promulgate regulations regarding this matter, this Court now considers the second part of the Chevron test, whether the Secretary's regulatory scheme is a reasonable and permissive interpretation of the statutory language and congressional intent. See Chevron, 467 U.S. at 843. The degree of deference to administrative agencies on this prong of the test is significant. In cases where the relevant statute is "silent or ambiguous", courts are generally required to defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The agency's construction need only be "rational and consistent with the statute." *See NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 123 (1987). An agency's interpretation of a statute must be "given controlling weight unless it is arbitrary, capricious or manifestly contrary to the statute." *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001) (citing *Chevron*, 467 U.S. at 843-44), *cert. denied*, 534 U.S. 1078 (2002). *See also Swonger v. Surface Trans. Bd.*, 265 F.3d 1135, 1140 (10th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002); *Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1040 (10th Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997). Because the regulations at issue, including the Subpart K Appendix, are reasonable and permissible interpretations of the statute by their plain meaning, because congressional intent further supports this interpretation, and because Congress has chosen to not alter the regulatory scheme, the regulations pass the *Chevron* test and must be upheld.

(a.) By its plain meaning, the regulatory scheme for determining disparity that Petitioners here challenge is a reasonable and permissive interpretation of the statutory language and Congressional intent. The statute requires that the Secre-

tary, in making the disparity determination, "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B). The Secretary's interpretation clearly does just this. The statutory phrase "with per-pupil expenditures or revenues above . . . or below" describes which LEAs must be disregarded in completing the disparity determination. Therefore, in order to determine which LEAs will be disregarded, a mandatory prerequisite step requires determining what is the State's per-pupil expenditures or revenues at the 95 and 5th percentiles.

As the Secretary's interpretation spelled out in the regulation's details, the 95th and 5th percentiles are determined based on the total student enrollment.[14] *See* 34 C.F.R. pt. 222, subpt. K, app. First, per district (or LEA) averages for per-pupil expenditure or revenues are established and the LEAs are ranked in this order from highest to lowest.[15] Next, the Secretary considers total student population and determines in which LEA the 95th and 5th percentiles of total students, as they are ranked in order by their LEA's average revenue per-pupil, fall.[16] LEAs ranked respectively above

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[14] Any interpretation that ignores the number of students in each district could create great flaws and inconsistencies in comparing true per student expenditures or revenues across the entire State.

[15] New Mexico employs per-pupil revenues and abbreviates these LEA figures as "revenue per MEM."

[16] Because every individual student has a corresponding per-pupil revenue determined by the LEA in which that student attends school, selecting the 95th and 5th percentiles of total membership in the manner prescribed by the regulations is the equivalent of selecting the 95th and 5th percentiles of total per-pupil revenues directly corresponding to each student in the state. In other words, in selecting the 95th and 5th percentiles of total students, the State selects the 95th and 5th percentile of the total number of per-pupil revenues corresponding to each student in the State.

and below the identified LEAs, that, according to the precise statutory language, are "with per-pupil expenditures or revenues above the 95th or below the 5th percentile of such revenues in the State," are disregarded before making the disparity determination. I.e., Once the 95th and 5th percentiles of per pupil expenditures or revenues are identified, the Secretary must proceed to exclude, or disregard, the LEAs above and below the respective cutoff points. The LEAs containing the actual cutoff points are not excluded which is a type of rounding that favors the Petitioners and makes it more difficult to meet equalization.

Clearly, by their plain meaning, the regulations, in accordance with the statute, require the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B); 34 C.F.R. § 222.162(a). The Secretary's interpretation excludes such LEAs and is undoubtedly "rational and consistent with the statute" (*United Food and Commercial Workers*, 484 U.S. at 123) and "based on a permissible construction of the statute" (*Chevron*, 467 U.S. at 843). The regulations being far from arbitrary or capricious, the Court must defer to the agency's interpretation.

(b.) Moreover, looking beyond plain meaning to legislative history and policy behind the statute further supports the reasonableness of the Secretary's regulatory scheme. When reviewing an ambiguous statute, the Court should "look to the provisions of the whole law, and to its object and policy," rather than the specifically disputed provisions in isolation. *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), *cert. denied* 500 U.S. 916 (1991). When Congress promulgated the current statute, it decided that disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), but failed to prescribe a precise methodology for calculating disparity. By leaving a gap in the statute,

Congress delegated authority to the Department to fill the statutory gap. *See National Cable & Telecommunications Assoc.*, 125 S. Ct. at 2699 (analyzing *Chevron*, 467 U.S. at 865-866). The Department responded to Congress' directive by promulgating 34 C.F.R. § 222.162, which includes 34 C.F.R. pt. 222, subpt. K, app.

The statutory provision at issue in this case was originally enacted as part of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). As expressed by the legislative history, states have the responsibility of providing an equal minimum educational opportunity for all public school students while also spreading the tax burden for such opportunities equitably. *See* House of Representatives Comm. on Education and Labor, Public Law 874 and State Equalization Plans: The Problems of the Legislative Prohibition of Section 5(d)(2) (Comm. Print 1974). In other words, an equalized system of state funding for public education should be equitable for both the children who attend public schools and the taxpayers who pay the costs of public education. *See* A.R. Odden & L.O. Picus, *School Finance: A Policy Perspective* (2d ed., McGraw Hill 2000). The measurement of disparity across 90 percent of the State's student population—as reflected by the Subpart K Appendix—is therefore consistent with Congress' intended framework for assessing a state's school finance structure.

The regulation reflects congressional intent. This point is illustrated by a response the Commissioner of Education made to comments on the proposed regulations in 1974. Specifically, the Commissioner was asked whether pupils or school districts are to be considered when determining the 95th and 5th percentile exclusions. After considering the methodology to be used, the Commissioner responded that the percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. The Commissioner reasoned:

> . . . basing *an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures.* In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

See 41 Fed. Reg. 26,323-24 (Jun. 25, 1976) (emphasis added). The Department's current regulation, and the appendix to Subpart K expressly adopted therein, maintains the disparity standard and methodology described above. *See* 34 C.F.R. § 222.162; 34 C.F.R. pt. 222, subpt. K, app. Basing the disparity calculation on the number of pupils, as set forth in the regulation, complies with congressional intent. Because the methodology is based on the expressed intentions of Congress and the agency's unique understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements.

(c.) Furthermore, the underlying legislative intent of the Impact Aid regulations did not change when Congress amended the statute in 1994.[17] While Congress was aware of

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[17] Petitioners make the conclusory allegation that "The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula in diverting Impact Aid funds from impacted districts to the State" confusingly citing *Gonzales v. Oregon*, __ U.S. __, 126 S. Ct. 904 (2006). (Pet. at 13.) *Gonzales* regards an interpretive rule by the U.S. Attorney General regarding assisted suicide and makes no reference whatsoever to the 1994 amendments, the Secretary of Education, or to the Impact Aid laws in any way. Similarly, Petitioners' accusation that the Secretary "ignore[s]" congressional statutes is baseless.

how the Department had historically applied the disparity standard—reflected at 34 C.F.R. § 222.63 (App.) (1993)—it did not adopt or preclude that precise methodology in the 1994 statutory amendments.[18] Congress presumably determined that while disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), the precise methodology for applying the disparity standard was an issue that should remain within the Department's discretion. As a result of this implicit acknowledgment by Congress of the Department's administrative expertise on the question of calculating disparity, the Secretary's decision below must be affirmed if the underlying regulatory scheme is a reasonable and permissive interpretation of the statutory language and Congressional intent.

Understanding that the intent did not change, the Department mirrored the pre-1994 regulations, which included a specific methodology for applying that standard, in the current appendix to subpart K. *See* 34 C.F.R. § 222.63 (App.) (1993). By changing language from pupil to LEA, the new statute simply clarified what the Department was already doing. The Secretary's disparity test removes LEAs, but in determining which LEAs to remove, the Department considers all students state-wide. The Department's current regulation contains the same per-pupil expenditure percentile ranking method as outlined in earlier appendices, and details the same methodology for calculating the twenty-five percent disparity test. The agency has not altered the methodology

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[18] From 1974 until 1994, the Impact Aid law provided the Department with near-total discretion to establish multiple standards by which States could obtain certification of equalization. One of three standards promulgated by the Department was the 25 percent disparity test, then set forth at 34 C.F.R. § 222.63 (1993). In 1994, Congress adopted the disparity test as the sole statutory standard for determining whether a State equalized its expenditures for all LEAs. The pre-1994 regulations also included a specific methodology for applying that standard, which is mirrored by the current Subpart K Appendix. *See* 34 C.F.R. § 222.63 (App.) (1993).

for calculating disparity since 1976 because Congress has never changed its intent to administer a fair disparity standard. Duplicating the pre-1994 computation in the appendix to subpart K conforms to congressional intent.

Because the regulation, by its plain meaning, simply clarifies and does not conflict with the statute, and because the regulation is based on and supported by congressional intent, legislative history, and the agency's comprehensive understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements. The Secretary acted reasonably in promulgating this regulatory scheme to clarify the ambiguous statute. Therefore, the Secretary's decision is reasonable and permissible, and should be upheld.[19]

3. Petitioners' arguments regarding the importance of the Impact Aid program do not justify a reason this Court should grant their Petition. While the Impact Aid program certainly serves a valuable purpose and is of great importance to those school districts affected by it, the program is significantly limited in scope and size. Considering how little of the nation is directly impacted by the statute and corresponding regulations at issue in this case highlights the limited nature of the program. Since Fiscal Year 1994, only three states (Alaska, Kansas, and New Mexico) have come before and been certified by the Secretary as operating equalized school aid programs. Insofar as Petitioners' arguments may be considered relevant to the example presented in Supreme Court

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[19] New Mexico properly applied the methodology established in the regulation for determining equalization, and Petitioners do not dispute this fact. Then, since the regulation is a reasonable and permissible construction of 20 U.S.C. § 7709(b), the New Mexico's disparity determination and the Department's certification thereof is proper. Petitioners' claim that the formula does not comply with 20 U.S.C. § 7709(b) is without merit, and the Secretary's decision should be affirmed.

Rule 10(c), the case at issue does not regard an important question of federal law that must be settled by this Court.

4. Finally, review by this Court is not the appropriate recourse for Petitioners to address their concerns; Congress has the ability to address such concerns and the means by which Petitioners should seek recourse. Congress is best suited to settle and address Petitioners' concern. Congress has the power and has had the opportunity to address this matter but has decided to permit the Secretary's interpretation to remain the governing law.

Congress has expressed no concern about the Department's regulatory implementation of 20 U.S.C. § 7709(b) despite multiple and recent opportunities to do so. In spite of recent legislative activity concerning the Impact Aid law generally, including statutory amendments, Congress has not indicated in any manner that the Department's regulatory implementation of 20 U.S.C. § 7709(b) is inappropriate or otherwise flawed. In October 2000, Congress reauthorized the overall Impact Aid statute without altering or commenting on the disparity standard whatsoever. *See* Impact Aid Reauthorization Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654A-368 (2000). Most recently, the 107th Congress amended the Impact Aid law as part of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). Once again, there were no changes to the statutory provisions at issue in this case.

When Congress "re-enacts a statute without change," it is "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (citing numerous cases). Considering the recent legislative history discussed above, Congress appears perfectly satisfied with the Secretary's interpretation of 20 U.S.C. § 7709(b). For the Court, then, to act would exceed its role and power in our nation's system of checks and balances.

Accordingly, Petitioners' complaint is not properly with this Court. They disagree with a longstanding duly promulgated regulatory interpretation of a Congressional statute. They are adamant that their interpretation of this statute is a better one than that of the regulatory agency assigned the responsibility of the administration of this law. Their remedy is with the Congress, not this honorable Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

LEIGH M. MANASEVIT *
Special Assistant Attorney General
for the State of New Mexico
JENNIFER S. MAUSKAPF
BRUSTEIN & MANASEVIT
3105 South Street, NW
Washington, DC 20007
(202) 965-3652

WILLIE R. BROWN
General Counsel
NEW MEXICO PUBLIC EDUCATION
DEPARTMENT
Jerry Apodaca Education Building
300 Don Gaspar Avenue
Santa Fe, NM 87501

Counsel for the New Mexico
Public Education Department

* Counsel of Record

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
DEPARTMENT OF EDUCATION

Docket No. 99-81-I
Impact Aid Case

IN THE MATTER OF ZUNI PUBLIC SCHOOL DISTRICT #89 AND GALLUP-MCKINLEY PUBLIC SCHOOLS,
Applicants,

PETITION FOR REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION BY THE SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION

COMES NOW the Zuni Public School District (hereinafter "Zuni"), by and through undersigned counsel, and hereby requests the Secretary of the United States Department of Education to review the opinion of the Honorable Allen C. Lewis, Chief Administrative Law Judge entered on April 17, 2001 and received by Zuni on April 24, 2001. The Administrative Law Judge determined that he did not have jurisdiction to address the substance of Zuni's claim that an appendix to the Department of Education regulation was invalid as it conflicted with statutory language involving the same matter. Accordingly, this request for review does not seek to overturn the decision of the Administrative Law Judge, but seeks a decision on the merits of Zuni's claim, which is clearly within the jurisdiction of the Secretary.

I. Impact Aid Issue

This appeal related to Federal Impact Aid which is paid by the federal government to school districts (local educational agencies "LEA's") which are impacted by a federal presence.

Zuni School District, for instance, has as its boundaries the boundaries of the Zuni Pueblo Reservation. Because of this reservation status, real property within the school district cannot be taxed. Because it cannot be taxed, Zuni cannot raise revenues through real property taxes. Impact Aid is supposed to compensate Zuni for this disability.

There is a statutory prohibition against a State taking credit for Federal Impact Aid payments made to LEAs in determining the amount of the state's contribution to LEAs for free public education. 20 USC § 7709A (1994). An exception to this general prohibition is also created by federal statute and permits a state to take credit for Federal Impact Aid if a state "has in effect a program of state aid that equalizes expenditures for free public education among local educational agencies in such state." 20 USC § 7709(b)(1).

In 1994, Congress created the disparity test to be used to determine whether a state equalized expenditures among its LEAs. 20 USC § 7709(b)(2)(A) provides:

> If, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency and the state with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the state with the lowest such expenditures or revenues by more than 25%.

In recognition that an anomaly may develop when comparing the bottom ranked LEA with the top ranked LEA, Congress adjusted the field to create a more homogenized group of LEAs from which to compute the disparity. 10 USC § 7709(b)(2)(B)(i) and 34 CFR § 222.162(a) (1999) provides that in working this calculation, the Secretary shall "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile

of such expenditures or revenues in the State." The disparity percentage is then calculated by determining the difference between the revenue per-pupil of the LEA at the 95th percentile and revenue per-pupil of the LEA at the 5th percentile. The difference is then divided by current expenditure or revenue per-pupil of the LEA at the 5th percentile and yields the disparity percentage.

The Appendix to sub-part K of 34 CFR Part 222, however, mandates that the student population of the State, not the LEA population, be used and adjusted to determine the per-pupil expenditure or revenue at the 5th and 95th percentiles:

> The determinations of disparity are made by ranking all LEAs and then identifying those LEAs in each ranking that falls at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs . . .

An example is then provided, which ranks the LEAs in order of expenditures per student, eliminates 5% of the student population beginning at the top and draws a line at that point to determine which LEA is now considered to be the top ranked LEA. The same process is followed in eliminating the bottom ranked LEAs. The State of New Mexico, instead of following the language in the statute or the language in the the body of the regulation, which essentially parrots the statute, followed the example in the Appendix. When New Mexico drew the line after eliminating 5% of the students from the top and from the bottom, it found itself drawing a line in the middle of LEA units. In trying to convert the elimination of students to the elimination of LEA's, New Mexico moved the line to the next LEA and eliminated 5.1% of the students from the top and 6.9% of the students from the bottom. While this demonstrates the difficulty in straying from the statutory language, the true issue is whether the Appendix to the regulations conflicts with the statutory language.

The critical language in the statute is that the Secretary is to:

> "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in this state".

Breaking this down, one is to "disregard local educational agencies", not students. Thus, the focus of the elimination is on LEAs. The statute continues and provides that LEA's are eliminated from the calculation if they have "per-pupil expenditure or revenues above the 95th percentile or under the 5th percentile." Thus, one is to look at the LEAs themselves and their relative per-pupil expenditures or revenues. Eliminating LEAs by eliminating students has nothing to do with this requirement. The statute then continues and sets forth the standard against which these per-pupil expenditures are measured, which is "of such [per-pupil] expenditures of the state." Again, there is no suggestion that member count or student count works its way into this elimination process.

There are only two possible interpretations of this language, neither of which include the methodology described in the Appendix or used by the State of New Mexico. The first option is the most obvious. The top 5% of the ranked LEAs and the bottom 5% of the ranked LEAs are eliminated. This would eliminate the top four or five districts and the bottom four- or five districts. New Mexico, following this procedure, would have a disparity of 26.93%, which means that the State is not equalized and is not entitled to keep the Impact Aid Funds paid to Zuni and similar districts.

The only other supportable method would to multiply the per-pupil figures for the highest LEA by 95% and per-pupil figures for the lowest LEA by 105%, draw the line and eliminate all LEAs above the top line and eliminate all LEAs below the bottom line. Performing this calculation would produce a disparity in New Mexico of 117.4%.

Both of these methods follow the mandates of the statute. They eliminate LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such revenues or expenditures of the State.

The purpose of Impact Aid should not be lost in this process. Congress has provided that when school districts are impacted by a federal presence, the federal government will pay its own way. An *exception* exists which allows a state to take credit for Impact Aid payments only if state funding is equalized among districts. To make this exception easier to obtain, differences in payments to school districts which reflect idiosyncratic needs are subtracted from the per-pupil expenditure calculations. Then the statute provides for eliminating the top 5% of the LEAs and the bottom 5% of the LEAs to further even out the field. Finally, the statute allows for up to a 25% disparity between the top and bottom LEA in this adjusted field. Nevertheless, only three states, New Mexico, Alaska and Kansas, even attempt to take credit for Impact Aid. For some reason, the United States Department of Education enacted a regulation which, in the case of New Mexico, enabled New Mexico to take credit for Impact Aid when, under the federal statute, it did not qualify for such privilege. By following the Appendix, New Mexico has eliminated 28% of all of its LEAs before it begins making its disparity calculation. Such an extraordinary adjustment would probably qualify any state to take advantage of the exception and take full credit for Impact Aid. This, in turn, destroys the whole purpose of Impact Aid and turns Impact Aid into a mechanism for funding State education as a whole. This is not an ignoble effort, but has nothing to do with Impact Aid.

Arguments were made by the Departments of Education (both Federal and State) that the statutory language upon which Zuni relies was constructed without due cause or reflection. The Appendix, it was argued, was the product of greater knowledge and understanding. Following the statutory

language, the Department warned, might result in none of the three remaining states qualifying for Impact Aid credit. These contentions, however, display a patronizing approach which is not only unwarranted, but illegal. See *Chevron USA, Inc. v. Natural Resources Defense*, 467 US 837, 843 (1984) and *Whitman v. American Trucking Association., Inc.. et al*, 121 S.Ct. 903, 918-19 (2001). An agency cannot override a Congressional enactment which "has directly spoken to the precise question at issue". *Chevron USA. Inc. v. Natural Resources Defense, supra.* Further, the result of not qualifying for the exception is that the LEA which is federally impacted receives its fair compensation. That was the intended purpose of Impact Aid.

The question before the Administrative Law Judge and the question posed by the Administrative Law Judge was how an Appendix to a regulation which conflicts with direct Congressional statutory language can survive. Attached are excerpts of the transcript of hearing with the Administrative Law Judge. The only conclusions that can be drawn from the exchanges between the Administrative Law Judge and counsel are that (a) the only reason that the Administrative Law Judge did not invalidate the Appendix to the regulation and decertify New Mexico as an equalized state was that the Judge determined that invalidating the Appendix to the regulation would be the same as invalidating a regulation, and this was beyond his jurisdiction; and (b) counsel for the United States Department of Education and the New Mexico Department of Education essentially agreed that the Appendix language does not find support in federal statute, but that the Secretary was exercising an apparent discretion to amend statutory language so as to achieve desired results. A synopsis of the exchange between Judge Lewis and counsel for the United States Department of Education, Mark Smith, follows:

On page 29, Judge Lewis notes that the United States Department of Education took the position that "Congress

made a mistake, that there were certain words in the statute that they left out or the drafting changed the language" such that there was a "substantial difference between what . . . Congress intended . . ." and what "Congress in fact put in there". Mr. Smith responded that he did not think Congress was "100% accurate with their language". On page 30, Judge Lewis asked Mr. Smith to show the Judge how "using the language in the statute, you can come to the results under the regulation?" Mr. Smith replies that one simply uses "the language of the regulation". To which Judge Lewis responded "in other words, the statute does not support the regulation? Its different?" Mr. Smith admits "it is different". Judge Lewis then comments that because of the difference,"it calls for the result that Zuni asks for?" Mr. Smith again jumps back to his position that Congress was unable to properly articulate its intent.

On page 32 Judge Lewis is still concerned about the difference between the statute and the regulation and asks Mr. Smith if perhaps he could point to some ambiguity which would provide the flexibility to perhaps validate the regulation. Judge Lewis states "and I've got a real problem if I have to decide this thing if I have to choose between what's in the statute and what's in the regulation. If you can show me the statute's ambiguous, then under normal rules of construction, you can then move over to the regulations which then interpret an ambiguous statute". Mr. Smith's response on page 33 is "the only way I can do that is by reference to the statutory purpose". Not satisfied with this answer Judge Lewis states at page 33, "but the only thing that we have from Congress is what Congress said in the statute . . . and if we go with Justice Scalia, he would say, that's it." Mr. Smith responded with the categorical statement that the statutory provision had to be construed in light of the history.

Mr. Jonathan Tarnow from the firm of Brustein and Manasevit of Washington, D.C., who represented the New

Mexico State Department of Education, had equal difficulty in trying to reconcile the statute with the regulation. At page 59 Judge Lewis states ". . . as I read your brief on the main issue, you seem to think that the statute is consistent with the use of the student population, and I want you to show me how you can get there under the terms of the statute." Mr. Tarnow' s response was "well, actually, Your Honor, since submitting—I think we've done a lot of thinking about this issue and this conflict that seems to appear, and I'm not certain that we would state that so plainly at this time. It is arguable that there is a difference, and we would defer to Mr. Smith on the Department's interpretation." When Mr. Tarnow then states that the statute "doesn't specifically state you look at the LEAs", Judge Lewis at page 60 responds "I want you to tell me what your interpretation is and show me how you get there under the statute". At page 60 through 65, Mr. Tarnow then describes a new method for calculating the disparity which finds support in neither the statute nor the regulation. Judge Lewis points out at page 65 that this interpretation "is then inconsistent with the regulation". Mr. Tarnow replies "arguably". When pushed, Mr. Tarnow then jumps to the original position which he had earlier discounted and states at page 65 "well, it's . . . again, Your Honor, we would agree with the Department that the only reasonable way of determining disparity is on a per-pupil expenditure is considering the students and not the LEAs". Judge Lewis finishes his discussion on this issue with Mr. Tarnow on page 67 and states that "it sounds as if your view is that the statute in the body of the reg as opposed to the appendix calls for a result different or method different than what's been adopted in the appendix". Mr. Tarnow responded "I would . . . I can see how . . . I could make an argument that is the case". Judge Lewis then stated: "Don't make an argument. Tell me what your position is". Mr. Tarnow stated that his position was "that the State followed the regulation and the regulation includes the Appendix". When asked by Judge Lewis "how is that consis-

tent with the statute, your interpretation of the statute?" Mr. Tarnow replied "literally, on the face of the words, perhaps not, probably not. But again, looking at the overall intent of the Impact Aid Program, the fact that if we were to read this exception from Section 8009 in a way that the districts would have us read it, that perhaps no state would qualify and the purpose of an exception is therefore undercut, and the purpose of enacting it by Congress is then called into question".

The whole problem with the Departments of Education's approach is that they attempt to justify overriding clear statutory language with a regulation appendix based upon their conception of the overall intent of Impact Aid. This purpose, as articulated by the Departments, is to not provide money to impacted school districts, but to provide money to states to assist in financing all school districts, whether or not they are impacted by a federal presence. This makes no sense.

The only conclusion that can be drawn is that the United States Department of Education in defending its regulation, and the State of New Mexico in attempting to keep Impact Aid dollars from deserving districts, seek to elevate a regulation over a statute in pursuit of a purpose which is clearly antithetical to the whole concept of Impact Aid.

The Secretary has jurisdiction over its own regulations. If, in this case, a regulation is clearly contrary to federal statute, there is no point in standing pat and forcing Zuni to continue litigation which Zuni believes will inevitably lead to the invalidation of this regulation. If New Mexico is not equalized under the standards set by Federal Statute, then the original intent and purpose of Impact Aid will be fulfilled. Zuni and other districts will receive their Impact Aid funds to which they are entitled because of a federal presence. The Secretary should declare the Appendix to be invalid and decertify New Mexico as an equalized state.

ROTH, VANAMBERG, ROGERS,
ORTIZ, FAIRBANKS & YEPA, LLP
Post Office Box 1447
Santa Fe, NM 87504-1447
505/983-7319

By: /s/ RONALD J. VANAMBERG
Ronald J. VanAmberg
Attorneys for Applicant
Zuni Public School District

APPENDIX B

Supreme Court Rule 15.2 requires:

> . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

Accordingly, and in addition to the arguments and statements made in the foregoing Brief in Opposition, New Mexico points out the following perceived misstatements made in the petition:

1. The Petition, on page 7, incorrectly states that a predetermination hearing was held for the certification at issue. In fact, as the parties stipulated (see Petitioner's Appendix F, pg. 202a, paragraph 21), no predetermination hearing was held that year. Petitioners apparently have their years confused. For all subsequent years, we have had predetermination hearings, but no predetermination hearing was held for the year at issue in this case.

2. In the Petition's Appendix B (pp. 30a-33a), the panel decision, the exhibit to the dissent has been reformatted by the printer in such a way that it may not be clear which districts Judge O'Brien is referring to as the ones at the cut-off points under his method.

3. The sequence of exhibits in Petitioner's Appendix D is peculiar. The notice of certification (pg. 41a) was issued as a part of the determination and really belongs back at page 216a where that same document is also presented. There is no reason to pre-

sent it a second time in Appendix D along with the ALJ's decision.

4. Beginning at page 163a, the Petitioner's Appendix purportedly presents the Department's final Impact Aid rules published on September 29, 1995, (*See* 60 Fed. Reg. 50,774 (Sept. 29, 1995)). This is inaccurate. In fact, it: 1) presents a heading from an entirely different notice, 2) omits virtually the entire preamble to the final Impact Aid rules, 3) omits the other Impact Aid regulations issued that day that are not germane to the case but were in the notice; and, 4) omits 222.161 which is germane to the case. The cited notice includes pages 50,774-50,800. Petitioners, however, only included pages 50,778-50,779 and 50,798-50,800.

5. At page 211a of the Petition (Petitioner's Appendix F), the entries for Santa Fe in the first two columns should be should be $3,050 and 1,344 respectively.

6. Also on page 211a of the Petition (Petitioner's Appendix F), the Total Mem. for Central should be 7,314.

7. On page 239a of the Petition (Petitioner's Appendix J) the figure in the second numerical column for Questa should read 1.182.

8. To clarify for the record, Petitioner's Appendices G, H, I, and J were not part of the administrative record of the decision under review.